INDEX

	Page
Petition for Writ of Certiorari	1
Summary and Short Statement of the Matter Involved	1– 2
Statement Disclosing Jurisdiction	2– 3
Questions Presented	3
Reasons Relied on for the Granting of this Petition for Writ of Certiorari	3– 6
Prayer for Writ	6
Brief in Support of Petition	7
Jurisdictional Grounds	7
Statement of the Case	7– 8
Specifications of Errors Relied Upon	8– 9
Argument under Specification of Error No. 1	9–16
Argument under Specification of Error No. 2	17–19
Conclusion	19

Page

Allred v. United States, 146 Fed. (2d) 193 (Ninth Circuit) 16

Brouse v. United States, 68 Fed. (2d) 294 (First Circuit) 5, 16

Brown v. Elliott, 225 U. S. 392, 32 S. Ct. 812 ..... 4, 12

T. F. Hart Inv. Co. v. Great Eastern Oil Co., 27 Fed. Supp. 713 15

Hyde v. United States, 225 U. S. 347, 32 S. Ct. 793 ..... 4, 12

Ledbetter v. United States, 170 U. S. 606, 18 S. Ct. 774, 42 L. Ed. 1162 ..... 4, 12, 16

Marcus v. United States, 20 Fed. (2d) 454 (Third Circuit) 5, 13

Pendergast v. United States, 317 U. S. 412, 63 S. Ct. 268 ..... 4, 12

U. S. v. Belfast Fabrics Corporation, 65 Fed. Supp. 567 15

U. S. v. Guertler, 147 Fed. (2d) 796 15

United States v. Clark Irvine, 98 U. S. 450, 25 L. Ed. 193 ..... 3, 4, 11, 13

United States v. Kissell, 218 U. S. 601, 31 S. Ct. 124, 54 L. Ed. 1168 ..... 4, 12

U. S. ex rel Hassell v. Mathues, 27 Fed. (2d) 137 14

United States v. Salberg, 287 Fed. 208 ..... 4, 10

United States v. Trotter, 8 Fed. Supp. 275 ..... 5, 13

Warren v. United States, 199 Fed. 753 (Fifth Circuit) 5, 12, 13

Statutes Cited

Title 18, Sec. 582, U. S. C. A. 10

Title 50, Sec. 302, 310 U. S. C. A. 1, 7, 9

Sec. 240(a) of the Judicial Code as amended by Act of February 13, 1925 [28 U. S. C. A., Sec. 347(a)] 2, 7

In the

Supreme Court of the United States

OCTOBER TERM 1947

No.....

SAMUEL HANNAH FOGEL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Honorables, the Chief Justice and Associate Justices of the United States:

Samuel Hannah Fogel, petitioner herein, presents herewith his petition for writ of certiorari and respectfully shows:—

1.

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED

This is a criminal case in which the petitioner was convicted of a felony under an indictment found by the Grand Jury and filed on January 22, 1947 alleging his failure to register on February 16, 1942 in violation of the Selective Training & Service Act of 1940 as amended and rules, orders, and regulations issued thereunder. Petitioner was

sentenced by the Court which tried the case without the aid of a jury to eighteen months in the penitentiary and to pay a fine of One Thousand ($1,000.00) Dollars.

By proper motion to dismiss the indictment and for acquittal at the close of the government's case and at the close of all the testimony and for new trial petitioner presented defenses of the three-year statute of limitations and that the government had not proved its case beyond a reasonable doubt. Each of these motions was overruled.

The Circuit Court of Appeals for the Fifth Circuit in a divided opinion, with Judge Sibley dissenting, affirmed the District Court holding that the statute of limitations of three years was not applicable and that the government had proved the petitioner guilty beyond a reasonable doubt. On both grounds Judge Sibley held that the conviction was unlawful.

2.

STATEMENT DISCLOSING THE BASIS UPON WHICH THIS COURT HAS JURISDICTION TO REVIEW THE JUDGMENT OF THE CIRCUIT COURT OF APPEALS

Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 [28 U. S. C. A. Sec. 347 (a)] is the statutory authority for this Honorable Court to exercise its jurisdiction in this case by requiring that it be certified to this Court for determination and correction of the grievous errors committed below in the administration of the Federal Criminal Law.

On June 12, 1947 the Circuit Court of Appeals for the Fifth Circuit affirmed the judgment of the lower Court, and on August 2, 1947 overruled a petition for rehearing which had been filed on June 30, 1947 and this petition for writ of certiorari is presented within thirty days from such final judgment.

3.

QUESTIONS PRESENTED

It is apparent from the statement under 1, supra, that the questions presented are:

(1) Whether the three-year statute of limitations barred the prosecution and conviction for the crime charged in the indictment.

(2) Whether the Government proved beyond a reasonable doubt that the petitioner committed the crime charged in the indictment.

4.

REASONS RELIED ON FOR THE GRANTING OF THIS PETITION FOR WRIT OF CERTIORARI

(1) The majority opinion of the Circuit Court of Appeals in deciding that the three-year statute of limitations did not bar this prosecution and conviction has decided a highly important question of Federal Criminal Law which has not been but should be settled by this Court in order to make uniform the general rule that the statute of limitations begins to run from the date that the crime is complete in accordance with the following authorities of this Honorable Court:

United States v. Clark Irvine, 98 U. S. 450, 25 L. Ed. 193;

United States v. Kissell, 218 U. S. 601, 31 S. Ct. 124, 54 L. Ed. 1168.

(2) The majority opinion of the Circuit Court of Appeals in deciding that the three-year statute of limitations did not bar prosecution and conviction for the completed crime of failure to register on February 16, 1942 has decided an important question of Federal Criminal Law in a way probably in conflict with the applicable decisions of this Court as shown by the cases cited under (1) above, and the following cases on crimes charging conspiracy:

Brown v. Elliott, 225 U. S. 392, 32 S. Ct. 812;
Hyde v. United States, 225 U. S. 347, 32 S. Ct. 793;
Ledbetter v. United States, 170 U. S. 606, 18 S. Ct. 774, 42 L. Ed. 1162;
Pendergast v. United States, 317 U. S. 412, 63 S. Ct. 268.

(3) The majority opinion of the Circuit Court of Appeals in deciding that the completed crime of failure to register on February 16, 1942 was a continuing crime has so far departed from the accepted and usual course of judicial proceedings, and has so far sanctioned such a departure by the District Court, as to call for an exercise of this Court's power of supervision in light of the following authorities directly to the contrary:

United States v. Clark Irvine, 98 U. S. 450, 25 L. Ed. 193;
United States v. Kissell, 218 U. S. 601, 31 S. Ct. 124, 54 L. Ed. 1168;
United States v. Salberg, 287 Fed. 208;

Marcus v. United States, 20 Fed. (2d) 454, Third Circuit;

Brouse v. United States, 68 Fed. (2d) 294, First Circuit;

Warren v. United States, 199 Fed. 753, Fifth Circuit;

United States v. Trotter, 8 Fed. Sup. 275.

(4) When the petitioner failed to register on February 16, 1942 as charged in the indictment he completed an offense under the statute irrespective of any duty he had thereafter to register, compliance with which would not have cancelled the completed crime. The holding of the majority opinion of the Circuit Court of Appeals to the contrary robs the petitioner of his valuable protection of the statute of limitations.

(5) The majority opinion of the Circuit Court of Appeals in holding that petitioner was guilty beyond a reasonable doubt has so far departed from the accepted and usual course of judicial proceedings, and has so far sanctioned such a departure by the District Court, as to call for an exercise of this Court's supervision because the testimony of the witness Joseph Fogel, brother of petitioner, places the petitioner's birth date in 1893 which would make him more than forty-five years of age on February 16, 1942, and therefore not required to register on that date. Petitioner was not sure of his age and no other witness testified. The dissenting opinion of Judge Sibley shows clearly that there is reasonable doubt.

Petitioner files herewith certified transcript of the record including the proceedings in the Circuit Court of Appeals below.

WHEREFORE, petitioner respectfully prays that a writ of certiorari may issue out of and under the seal of this Court, directed to the United States Circuit Court of Appeals, Fifth Circuit, commanding that Court to certify and send to this Court on a day certain, to be therein designated, a full and complete transcript of the record and all proceedings in the cause entitled Samuel Hannah Fogel v. United States of America, No. 11930, on the docket of said Court, to the end that the case may be reviewed and determined by this Court as provided by law, that the judgment of the Circuit Court of Appeals may be reversed, and that your petitioner may have such other and further relief and remedy as this Court may deem appropriate and in conformity with law.

WEBSTER ATWELL,
Dallas, Texas,
Attorney for Petitioner.

HOWARD DAILEY,
EMIL CORENBLETH,
Of Counsel.

BRIEF IN SUPPORT OF PETITION

JURISDICTIONAL GROUNDS

The judgment of the Court of Civil Appeals for the Fifth Circuit in this cause was rendered June 12, 1947. (R. p. 86.) The majority opinion and the dissenting opinion have not yet been reported. Petition for rehearing was filed June 30, 1947 (R. pp. 87-89), and the order denying the rehearing was August 2, 1947. (R. p. 90.)

It is sought to bring this case before this Court on a petition for writ of certiorari as provided for by Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925. [28 U. S. C. A. Sec. 347 (a).] And, it is submitted that this is a case which this Court should supervise by granting a writ of certiorari because of the grave importance involved in the uniform and fair administration of the Federal Criminal Law.

STATEMENT OF THE CASE

This is a criminal case in which the petitioner was convicted of a felony under an indictment found by the Grand Jury on January 22, 1947, alleging his failure to register on February 16, 1942 in violation of the Selective Training & Service Act of 1940 as amended and rules, orders and regulations issued thereunder. (R. pp. 1-2.) Petitioner was sentenced by the Court which tried the case without the aid of a jury to eighteen months in the penitentiary and to pay a fine of One Thousand ($1,000.00) Dollars. (R. pp. 4-5.)

By proper motion to dismiss the indictment (R. pp. 2-3) and for acquittal at the closing of the government's case (R. p. 33), and at the close of all the testimony (R. p. 58) and for new trial (R. pp. 6-13) petitioner presented the defenses of three-year statute of limitations, and that the government had not proved its case beyond a reasonable doubt. Each of these motions was overruled. (R. pp. 4, 44, 62-64; and 13-14.)

The Circuit Court of Appeals for the Fifth Circuit in a divided opinion, with Judge Sibley dissenting (R. pp. 77-85) affirmed the District Court (R. p. 86) holding that the statute of limitations of three years was not applicable and that the government had proved the petitioner guilty beyond a reasonable doubt. On both grounds Judge Sibley held that the conviction was unlawful. (R. pp. 81-85.)

Petitioner respectfully submits that the three-year statute of limitations did bar his prosecution and conviction and that the government did not prove beyond a reasonable doubt that he was guilty as charged.

SPECIFICATIONS OF ERRORS RELIED UPON

1. The Courts below erred in refusing to hold that this prosecution was barred by the three-year statute of limitations since the indictment was not found within three years from the time that the offense is alleged to have been and was committed.

2. The Courts below erred in refusing to acquit the petitioner of the charges because it was not shown beyond a reasonable doubt that the petitioner was between the

ages of eighteen and forty-five years on or about February 16, 1942 when he was ordered to present himself for and submit to registration under the Selective Training and Service Act of 1940 as amended.

Argument under Specification of Error No. 1

The indictment which was filed January 22, 1947 charges:

> "that heretofore, to-wit, on or about the 16th day of February, A. D. 1942, one Samuel Hannah Fogel * * * in Dallas County, Texas, * * * did * * * fail and neglect to register with a Selective Service Draft Board * * * in violation of the Act of Congress, commonly cited as the Selective Training and Service Act of 1940, as amended, and the Rules, Orders and Regulations issued and promulgated by virtue of and in pursuance thereto." (R. pp. 1-2.)

The Selective Training and Service Act of 1940 as amended in Section 302 provides that:

> "It shall be the duty of every male citizen residing in the United States, who, on the day or days fixed for the first or any subsequent registration, is between the ages of eighteen and sixty-five, to present himself for and submit to registration at such time or times and place or places, and in such manner and in such age group or groups, as shall be determined by the rules and regulations prescribed hereunder." *(Title 50, U. S. C. A., Sec. 302.)*

Section 310 of the same title prescribes the offense and punishment for the failure of such person to present himself for and to submit to registration as provided in the statute.

Since the Selective Training and Service Act did not specifically provide for any limitation within which the government must proceed against one who it is alleged violated any of its provisions, the general limitation statutes are applicable. Title 18, Section 582, U. S. C. A. provides:

> "No person shall be prosecuted, tried or punished for any offense, * * * unless the indictment is found, or the information instituted within three years next after such offense shall have been committed."

Under the provisions of the Selective Training and Service Act, the President issued certain proclamations, rules and regulations, and among them was the proclamation requiring all male persons residing in the United States between the ages of eighteen and forty-five to present themselves for and submit to registration on February 16, 1942. A subsequent proclamation required all male citizens between the ages of eighteen and sixty-five to register on April 27, 1942. The petitioner failed to present himself for and submit to registration on either day. Accordingly, the respondent indicted petitioner for failure to present himself and submit to registration on February 16, 1942, and the indictment was found and filed on January 22, 1947 nearly five years after the alleged offense was committed.

When the petitioner did not register on February 16, 1942 he violated the law and the offense was complete. The crime after that day was complete. Therefore, the statute of limitations began to run from that date, and three years thereafter barred prosecution for that crime. This position is directly sustained by the case of *United States v. Salberg, 287 Fed. 208*, where the defendant was charged with

failing and refusing to register under the Selective Service Act of 1917, in an indictment charging the defendant with failure to register on June 5, 1917 as required by the President's proclamation, and the indictment was not found within the three-year period from June 5, 1917. There the Court held that the offense charged as well as the offense committed was barred by the statute of limitation. The Selective Service Act of 1917 insofar as the registration provision thereof is concerned, is not unlike that of 1940. Both require all male persons between certain ages to present themselves for and submit to registration under the provisions of the Act, and the Court in the *Salberg case* refused to hold that the offense of the failure to register upon the day certain as charged in the indictment was any continuing offense which would rob the defendant of the protection of the statute of limitation.

This position is also sustained in principle by this Honorable Court in the case of *United States v. Clark Irvine, 98 U. S. 450, 25 L. Ed. 193*, where the indictment charged the defendant with wrongfully withholding pension money and that he had continuously withheld it until the time of finding the indictment in September, 1875, which was more than two years from the time the defendant took possession of the money and withheld it from the one rightfully entitled to it. The defendant pled the two-year statute of limitations and this Honorable Court held the prosecution and conviction for the crime so charged was barred by the statute and was unlawful, in face of the argument by the government that the defendant continued to withhold the money every year, every month, and every day within the

meaning of the statute. This Honorable Court held that there is but one offense and that it is committed when the act or series of acts necessary to constitute a criminal withholding of the money have transpired, and that then the crime is complete and from that day the statute of limitations begins to run against the prosecution, and stated:

> "We do not so construe the act. Whenever the act or series of acts necessary to constitute a criminal withholding of the money have transpired the crime is complete and from that day the statute of limitations begins to run against the prosecution."

This position is likewise sustained in principle by this Honorable Court in the case of *United States v. Kissell, 218 U. S. 601, 31 S. Ct. 124*, wherein this Honorable Court states that "the mere continuance of the result of a crime does not continue the crime," as well as other cases of this Honorable Court dealing with charges of conspiracy, to-wit:

Brown v. Elliott, 225 U. S. 392, 32 S. Ct. 812;
Hyde v. United States, 225 U. S. 347, 32 S. Ct. 793;
Ledbetter v. United States, 170 U. S. 606, 18 S. Ct. 774, 32 L. Ed. 1162;
Pendergast v. United States, 317 U. S. 412, 63 S. Ct. 268.

This position is also sustained in principle by the following cases decided by the United States Circuit Court of Appeals:

In *Warren v. United States, 199 Fed. 753 (Fifth Circuit)*, defendant was indicted and convicted in the lower Court for concealing assets from a trustee in bankruptcy

under an indictment found more than twelve months after the election of the trustee. The indictment charges that the defendant on or about a certain day and continuously thereafter concealed from the trustee property belonging to the bankrupt estate. Nevertheless, the Circuit Court of Appeals for the Fifth Circuit reversed this conviction on the ground that the crime was completed when the trustee was elected and the property of the bankrupt estate was withheld from him and that the statute of limitations began to run from that date. Said Court cited and quoted from the case of *United States v. Clark Irvine, supra*, and refused to hold that there was any continuous offense although the concealment continued. This was merely the result of the crime already committed. In the case at bar the majority opinion refused to recognize that Court's own decision in this *Warren case.*

In *Marcus v. United States, 20 Fed. (2d) 454, (Third Circuit)*, where the defendant was indicted and prosecuted for concealing assets from the trustee in bankruptcy and the Court held that the offense was complete when the trustee was elected. The statute of limitations began to run from that date.

This position is also upheld in the District Court case of *United States v. Trotter, 8 Fed. Supp. 275* which is also upon concealment of assets from a trustee in bankruptcy wherein the indictment also alleges continuous withholding and concealing. Nevertheless, the Court held that the crime was complete from the date that the trustee was elected and that the statute of limitations began to run from

that date. Upon that date an indictment or information could have been filed.

Judge Sibley in his dissenting opinion shows clearly the fallacy of the majority opinion. He also sustains the position that the crime was complete when the petitioner failed to register on the date set for the registration. And, the petitioner could have been promptly indicted even though he may have been under a continuing duty to register, and even though he may have subsequently registered. Such subsequent registration would not have cancelled his prior crime. He did not have to do anything else after his failure to register and unless the statute of limitations bars the prosecution and conviction for this failure to register, petitioner is denied the benefit and the protection of such statute and such substantive right. *U. S. ex rel. Hassell v. Mathues, 27 Fed. (2d) 137.*

That there was a continuing duty to register need not be challenged. No doubt this continuing duty was set out in the regulations in order to reach those citizens or residents who were confined in the penitentiary, or who were sick, or who were beyond the confines of the United States on the date set for the registration; but the existence of such continuing duty could not make this a continuing offense and crime when the petitioner did nothing at all after he failed to register and his offense and crime became complete then. In this light, the cases upon conspiracy where overt acts were committed in pursuance to the original agreement or where other acts were committed to carry the original agreement forward are inapplicable. So, those cases where defendants are charged with failure to keep their local

draft boards informed of their whereabouts under indictments which alleged a period of time that was not barred by the statutes of limitations [*U. S. v. Guertler, 147 Fed. (2d) 796*], are inapplicable; and the same can be stated with reference to keeping records under the maximum price regulations where the indictment charges the failure of the defendant to keep the records between certain periods, which periods were within the statutory time. *(U. S. v. Belfast Fabrics Corporation, 65 Fed. Supp. 567.)*

Mere concealment of a crime without doing anything more to complete it, and where the defendant has done nothing else after he has completed it, cannot continue the crime and prevent the defendant from taking advantage of his substantive right of the protection of the statute of limitation. (Cases cited above, as well as the *T. F. Hart Inv. Co. v. Great Eastern Oil Co., 27 Fed. Supp. 713.)*

The majority opinion of the Court below did not cite a single case to sustain it on this question. Judge Sibley's dissenting opinion cites some of the cases set out above and reasons the matter correctly. All the authority is against the respondent's position.

The President issued a subsequent proclamation requiring all citizens and residents between the ages of eighteen and sixty-five years to register on April 27, 1942. Assuming that the respondent is not bound by the dates set out in the indictment, nevertheless, the failure of the petitioner to register on April 27, 1942 is still nearly five years before the indictment was found. However, the date charged

in the indictment will be accepted upon the question of limitations unless evidence is introduced to vary it. [*Brouse v. United States, 68 Fed. (2d) 294, First Circuit; Allred v. United States, 146 Fed. (2d) 193, Ninth Circuit.*] In the case at bar the evidence is conclusive that the petitioner failed to register on February 16, 1942 which is the date charged and there is no proof that the crime was committed and completed within the statutory period of limitations. *(Ledbetter v. United States, 170 U. S. 606, 18 S. Ct. 774; 42 L. Ed. 1162.)*

Most of the testimony in the record is in regard to the petitioner's age. The only evidence which the Government introduced was an admission by the petitioner long after February 16, 1942 in a hearing before the Immigration authorities that he thought he was born on July 10, 1898. Assuming that this is his birth date, he would have been forty-five years old on July 10, 1943. Adopting the Government's argument that the petitioner was under a continuing duty hourly, daily, weekly, monthly, yearly, to present himself for and submit to registration after February 16, 1942, he was certainly under no such continuing duty under the proclamation of the President upon which the indictment in this case is predicated after he became forty-five years old. On July 10, 1943 he was forty-five years old and it is clearly evident that the indictment was found in this case more than three years after that date. Even under this far-fetched and unreasonable theory of the respondent the conviction is unlawful.

Argument under Specification of Error No. 2

The indictment charges that

> "the said defendant was then and there such a person who was bounden under the provisions of said Act, Rules, Orders and Regulations to so register as is required by the provisions of the said Act and the said Rules, Orders, and Regulations." (R. p. 2.)

In view of such allegations, which were necessary, respondent had the burden to establish beyond a reasonable doubt that petitioner was between the ages of eighteen and forty-five on February 16, 1942 which was the date set for registration of such ages.

Therefore, most of the testimony in the record was with respect to the age of the petitioner on that date. This testimony with respect to the petitioner's age as introduced by the respondent consisted solely of admissions made by petitioner on February 7, 1946 and September 12, 1946 before Mr. Glenn A. Torrence, an examiner of the United States Immigration and Naturalization Service, that he was born on July 10, 1898. (R. pp. 19-21.) These admissions were in connection with naturalization proceedings but were made long after the alleged offense. Also the Government introduced testimony of Mr. Alton Bryant, Special Agent of the F. B. I. who testified that petitioner stated he did not know exactly when he was born, but thought he was born some time between 1895 and 1898. (R. p. 29.) This took place in October, 1946 long after the alleged offense. (R. p. 27.)

The above constitutes all the evidence introduced by the Government with respect to the age of the petitioner, and the only other evidence in the record is that of Joseph Fogel, the brother of the petitioner, who testified as follows: That he has lived in Philadelphia, Pennsylvania for thirty-four years, married and has three boys, and became a naturalized citizen in 1919 (R. pp. 44-45); that he came to this country when he was twenty-one years old in 1912 from Poland which was under Russian control; that there were seven children in his family; that all of them were killed or died and only he and the petitioner are living (R. p. 46); that he sent for the petitioner to come to the United States shortly after he arrived here and sent the petitioner the tickets for his transportation, and the petitioner was close to twenty when he arrived here on June 18, 1913 (R. p. 47); that petitioner stayed and lived with the witness until 1915 or 1916 when he moved to Texas (R. p. 48); that witness was about two and a half years older than the petitioner, and that one of their brothers or sisters who was born in between them had died (R. p. 50); that he knows the name of the ship on which the petitioner arrived in the United States and had an independent recollection of petitioner's age (R. p. 51); that he left Poland before he was twenty-one years of age so as to escape the Russian Army (R. p. 52); that he was in the clothing business and registered for the selective service in this last war (R. pp. 53-54); that he had two boys who were in the last war, one of whom was shot down after twenty-five missions over Germany. (R. p. 57.)

Accepting the testimony of Joseph Fogel who was not impeached and whose testimony was the only direct testimony upon the question of the age of the petitioner, respondent has certainly failed to prove beyond a reasonable doubt that the petitioner was between the ages of eighteen and forty-five on February 16, 1942 and therefore that he committed the crime charged. The only authority needed for this assertion is the dissenting opinion of Judge Sibley. (R. pp. 81-85.) The existence of this reasonable doubt also makes this conviction unlawful.

CONCLUSION

Petitioner respectfully prays that the accompanying petition for writ of certiorari be granted, and that the errors in the judgment of the Circuit Court of Appeals be corrected.

This cause is earnestly and confidently submitted.

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes and regulations involved	2
Statement	5
Argument	7
Conclusion	14

CITATIONS

Cases:	
Fiswick v. *United States*, 329 U. S. 211	12
Glasser v. *United States*, 315 U. S. 60	13
Hale v. *United States*, 149 F. 2d 401, certiorari denied, 326 U. S. 732	11
Ledbetter v. *United States*, 170 U. S. 606	11
United States v. *Belfast Fabrics Corporation*, 65 F. Supp. 567	8
United States v. *Guertler*, 147 F. 2d 796, certiorari denied, 325 U. S. 879	8
United States v. *Irvine*, 98 U. S. 450	10
United States v. *Kissel*, 218 U. S. 601	12
United States v. *Nazzaro*, 65 F. Supp. 456	8
United States v. *Perlstein*, 126 F. 2d 789, certiorari denied, 316 U. S. 678	11
United States v. *Salberg*, 287 Fed. 208	10
Warren v. *United States*, 199 Fed. 753	10
Winslett v. *United States*, 124 F. 2d 302	11
Statutes:	
Selective Training and Service Act of 1940, c. 720, 54 Stat. 885, as amended by the Act of December 20, 1941, c. 602, § 1, 55 Stat. 844:	
Sec. 2 [50 U. S. C. App., Supp. V, 302]	2
Sec. 10 [50 U. S. C. App. 310]	3, 12
Sec. 11 [50 U. S. C. App. 311]	3
11 U. S. C. 52(d)	8
18 U. S. C. 582	3
Regulations:	
Presidential Proclamation No. 2535, issued January 5, 1942 (7 F. R. 177)	3, 9
Presidential Proclamation No. 2541, issued March 19, 1942 (7 F. R. 2181)	4, 9, 13
Selective Service Regulations:	
Sec. 611. 3 (6 F. R. 6842)	9
Sec. 611. 4 (6 F. R. 6842)	9
Sec. 611.5 (d) (6 F. R. 6842)	5, 8, 9, 11, 13

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 285

SAMUEL HANNAH FOGEL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The majority and dissenting opinions in the circuit court of appeals (R. 75–81) are reported at 162 F. 2d 54.

JURISDICTION

The judgment of the circuit court of appeals was entered June 12, 1947 (R. 81), and a petition for rehearing (R. 82–84) was denied August 2, 1947 (R. 85). The petition for a writ of certiorari was filed August 21, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the duty to register for selective service continued beyond the date fixed for registration, so that one who failed to register on the date fixed and did not thereafter register could be prosecuted for such failure more than three years after the date on which he should have registered.

2. Whether the evidence is sufficient to sustain the finding of the trial court, sitting without a jury, that petitioner was under 45 years of age on February 16, 1942 (Third Registration Day), and whether, in any event, that finding was vital, it being undisputed that petitioner was under 65 years of age on April 27, 1942 (Fourth Registration Day).

STATUTES AND REGULATIONS INVOLVED

The Selective Training and Service Act of 1940, c. 720, 54 Stat. 885, as amended by the Act of December 20, 1941, c. 602, § 1, 55 Stat. 844, provided in pertinent part:

> SEC. 2 [50 U. S. C. App., Supp. V. 302]. Except as otherwise provided in this Act, it shall be the duty of every male citizen of the United States, and of every other male person residing in the United States, who, on the day or days fixed for the first or any subsequent registration, is between the ages of eighteen and sixty-five, to present himself for and submit to registration at such time or times and place or places,

and in such manner and in such age group or groups, as shall be determined by rules and regulations prescribed hereunder.

* * * * *

SEC. 10 [50 U. S. C. App. 310]. (a) The President is authorized—

(1) to prescribe the necessary rules and regulations to carry out the provisions of this Act;

* * * * *

SEC. 11 [50 U. S. C. App. 311]. * * * any person * * * who * * * evades registration * * * or who in any manner shall knowingly fail or neglect to perform any duty required of him under or in the execution of this Act, or rules or regulations made pursuant to this Act, * * * shall, upon conviction * * *, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment * * *.

18 U. S. C. 582 provides in pertinent part:

No person shall be prosecuted, tried, or punished for any offense, not capital, * * * unless the indictment is found, or the information is instituted, within three years next after such offense shall have been committed.

Presidential Proclamation No. 2535, issued January 5, 1942, and designating Third Registration Day (7 F. R. 177), provided in pertinent part:

> 2. (a) Every male citizen of the United States, and every other male person residing in the continental United States * * * is required to and shall on February 16, 1942, present himself for and submit to registration before a duly designated registration official or selective service local board * * * if such male citizen or other male person on December 31, 1941, has attained the twentieth anniversary of the day of his birth and on February 16, 1942, has not attained the forty-fifth anniversary of the day of his birth, and has not heretofore been registered * * *.

Presidential Proclamation No. 2541, issued March 19, 1942, and designating Fourth Registration Day (7 F. R. 2181), provided in pertinent part:

> 2. (a) Every male citizen of the United States, and every other male person residing in the continental United States * * * is required to and shall on April 27, 1942, present himself for and submit to registration before a duly designated registration official or selective service local board * * * if such male citizen or other male person on February 16, 1942, had attained the forty-fifth anniversary of the day of his birth and on April 27, 1942, has not attained the sixty-fifth anniversary of the day of his birth, and has not heretofore been registered * * *.

Section 611.5 of the Selective Service Regulations (6 F. R. 6842) provided in pertinent part:[1]

> § 611.5 *Responsibility for performance of duty.*— * * *.
>
> * * * * *
>
> (d) The duty of every man subject to registration to present himself for and submit to registration shall continue at all times, and if for any reason any such man is not registered on the day fixed for his registration, he shall immediately present himself for and submit to registration before the local board in the area where he happens to be.
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> * * * * *

STATEMENT

A single-count indictment (R. 1–2) filed January 22, 1947, in the District Court for the Northern District of Texas charged that petitioner, on or about February 16, 1942, with intent to evade military service, wilfully failed to register with a selective service draft board, in violation of the Selective Training and Service Act of 1940, as amended, and the regulations and orders thereunder. Following a trial by a judge, a jury having been waived (R. 18), petitioner was found guilty and sentenced to 18 months' imprisonment and to pay a fine of $1,000 (R. 4–5). On appeal,

[1] This section was originally Paragraph 205 of the Regulations. The renumbering became effective as of February 1, 1942. (6 F. R. 6841.)

the judgment of conviction was affirmed, one judge dissenting (R. 81).

The Government established at the trial that petitioner, an alien resident of the United States, never registered for selective service (R. 21, 27, 30), and that fact is not disputed (see R. 38; Pet. 10). The Government further proved that on or about February 7, 1946, and again on September 12, 1946, petitioner stated under oath to a naturalization examiner of the Immigration and Naturalization Service, in a proceeding to establish his lawful entry into the United States as a preliminary to filing a declaration of intention to become a citizen, that he was born on July 10, 1898 (R. 19–20, 23). If that was petitioner's birth date, he was 43 years old on February 16, 1942, and was required by the terms of Proclamation No. 2535 (*supra*, pp. 3–4) to register for selective service on that date.

Petitioner's defense was that the prosecution was barred by the statute of limitations (R. 3, 36–40) and that in any event he had attained the age of 45 prior to February 16, 1942, so that he did not fall within the age group required to register by Proclamation No. 2535 (R. 44–52). Petitioner's evidence in respect of his age consisted of the testimony of his brother Joseph, who testified that he, Joseph, came to the United States from Poland in 1912 at the age of 21 (R. 46) and that shortly thereafter he sent for peti-

tioner, who arrived in the United States on June 18, 1913, at which time petitioner was "close to twenty" (R. 47). According to Joseph's testimony, therefore, petitioner was 48 years old on February 16, 1942, and thus not within the age group specified in Proclamation No. 2535. Joseph admitted that "in the old Country, they actually kept no exact date of birthdays." He explained how he knew that he himself was 21 when he emigrated to the United States by saying that he left Poland to avoid being called into the Russian Army, departing four weeks before his induction was due, and that this was the only way he could recall his age at the time of his emigration. (R. 52.) He explained how he knew petitioner's approximate age by saying that there was "around two and a half years difference" between their ages according to "what my mother used to tell" (R. 50). Petitioner himself did not testify.

ARGUMENT

1. Petitioner contends that, assuming he was under 45 years of age on February 16, 1942, his failure to register for selective service on that date, without excuse, constituted a "completed * * * offense * * * irrespective of any duty he had thereafter to register, compliance with which would not have cancelled the completed crime" (Pet. 5; see also Pet. 10, 14) and that therefore, since the indictment was filed more than three years after that date, the prose-

cution was barred by the statute of limitations (*supra,* p. 3) (Pet. 8, 9–16). Section 611.5 (d) of the Selective Service Regulations provided, however, that the duty to register "shall continue at all times" and that if for any reason a man subject to registration "is not registered on the day fixed for his registration, he shall immediately present himself for and submit to registration * * *" (*supra,* p. 5). Clearly, therefore, while petitioner committed the offense of failure to register on February 16, 1942, his failure to register thereafter constituted a day-to-day continuation of the original offense up to and including the date of the indictment. Just as other continuing failures to perform duties imposed by law, such as failure of a registrant to keep his draft board advised of his address (*United States* v. *Guertler,* 147 F. 2d 796, 797 (C. C. A. 2), certiorari denied, 325 U. S. 879), failure to keep records as required by law (*United States* v. *Belfast Fabrics Corporation,* 65 F. Supp. 567 (S. D. N. Y.)), concealment of assets of a bankrupt (see 11 U. S. C. 52 (d); *United States* v. *Nazzaro,* 65 F. Supp. 456 (S. D. N. Y.)), etc., have been held to constitute continuing offenses, so too the crime of failing to register for selective service was a continuing offense, expressly so declared by the terms of Regulation 611.5 (d).[2]

[2] Conceding that "there was a continuing duty to register" under this regulation, petitioner seeks to explain away the relevance of this continuing duty in respect of when

Petitioner seeks to demonstrate that his failure to register on February 16, 1942, completed the offense so as to start the period of limitations running from that day by pointing out that subsequent compliance with his continuing duty to register "would not have cancelled the completed crime" (Pet. 5, 10, 14). Of course, any continuing offense is complete in the sense that once it starts the offender subjects himself to criminal liability which he cannot thereafter extinguish by terminating the course of his illegal conduct.

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the statute of limitations began to run by arguing that "No doubt this continuing duty was set out in the regulations in order to reach those citizens or residents who were confined in the penitentiary, or who were sick, or who were beyond the confines of the United States on the date set for the registration" (Pet. 14), with the result, evidently, that a further registration date was set for those thus circumstanced, and their duty was not exhausted. It should be pointed out, however, that Sections 611.3 and 611.4 (6 F. R. 6842) were specifically designed to cover men who were outside areas where local boards were organized and who were inmates of various types of institutions on the day fixed for registration, and established other times for their registration, and that the various Proclamations by which registration days were designated themselves provided that a man who was unable to register on the day fixed "because of circumstances beyond his control" should do so "as soon as possible after the cause for such inability ceases to exist" (see, e. g., Proclamation No. 2535 (7 F. R. 177, 178) and Proclamation No. 2541 (7 F. R. 2181, 2182)). But there can be no doubt, in view of the unequivocal language of Section 611.5 (d), that it applied to all cases of non-registration regardless of the reason, good or bad, and imposed a continuing duty to register irrespective of the circumstances which occasioned the failure to register.

Thus, one who enters into a conspiracy which has ripened into a punishable crime by the commission of an overt act may not avoid his criminal liability for what was done by affirmative withdrawal. Similarly, where the continuing offense is negative in character, i. e., failure to do some act required, criminal liability that is once incurred cannot be avoided by subsequently doing the act. But the real effect of doing the act is to terminate an offense which would otherwise continue. And, concomitantly, until there is such an affirmative termination of continuing criminal conduct, the statute of limitations does not begin to function.

Cases like *United States* v. *Irvine,* 98 U. S. 450, *Warren* v. *United States,* 199 Fed. 753 (C. C. A. 5), and *United States* v. *Salberg,* 287 Fed. 208 (N. D. Ohio), relied on by petitioner (Pet. 10–13) and by the dissenting judge below (R. 79), are clearly distinguishable from the present case since in none of those cases was the offense involved declared to be continuous in nature by the statute defining the offense, or by any regulation issued pursuant to it.[3]

[3] The *Salberg* case held that a prosecution for failure to register under the Selective Service Act of May 18, 1917, commenced more than three years after the date on which registration should have occurred, was barred by the statute of limitations. However, the opinion in that case refers to no regulation under that Act providing that the duty to register should continue at all times after the registration day fixed.

It is true that the indictment in this case alleged that the offense occurred "on or about the 16th day of February, A. D. 1942" (R. 1). It would have been better pleading, no doubt, to have charged that the offense continued to the time of the indictment or to a time within three years of its return. However, since the proof showed that petitioner had never registered and since the court could take judicial notice of the regulation making the duty to register a continuing obligation, clearly no prejudice resulted from this technical deficiency in the indictment. It is well settled, of course, that it is unnecessary "to prove that the offence was committed upon the day alleged, unless a particular day be made material by the statute creating the offence. Ordinarily, proof of any day before the finding of the indictment, and within the statute of limitations, will be sufficient." *Ledbetter* v. *United States,* 170 U. S. 606, 612; see also *Hale* v. *United States,* 149 F. 2d 401, 403 (C. C. A. 5), certiorari denied, 326 U. S. 732; *United States* v. *Perlstein,* 126 F. 2d 789, 798 (C. C. A. 3), certiorari denied, 316 U. S. 678; *Winslett* v. *United States,* 124 F. 2d 302, 303 (C. C. A. 5). Analogously, where, as here, the indictment charges that the offense occurred on or about a day antedating the period of limitations, and the proof shows that the offense commenced on the day alleged, but continued down to the time of the indictment, the lack of an allegation

of continuance is equally immaterial and non-prejudicial.[4]

Petitioner's cognate contention that, even assuming he was under a continuing duty to register after February 16, 1942, and assuming he was born on July 10, 1898, his duty to register ceased when he attained the age of 45 on July 10, 1943, which was also beyond the three-year limitations period preceding the return of the indictment (Pet. 16), is equally without merit. Presidential Proclamation No. 2535 (*supra*, pp. 3–4) specifically directed that those under 45 on February 16, 1942, should register, and Regulation 611.5 (d) (*supra*, p. 5) specifically provided that that duty should be a continuing one. The regulation made no exception as to anyone who attained the age of 45 after the crucial date.

2. Petitioner also contends that the Government failed to prove beyond a reasonable doubt that he was under 45 on February 16, 1942, and so within the age group required to register on that date (Pet. 5, 8–9, 17–19). The Government estab-

[4] Petitioner points out (Pet. 12), correctly (*Fiswick* v. *United States*, 329 U. S. 211, 216; *United States* v. *Kissel*, 218 U. S. 601, 607), that "the mere continuance of the result of a crime does not continue the crime," but that principle has no relevance here. The Government relies, not on a continuance of the result of petitioner's failure to register, but on the express terms of Regulation 611.5 (d), issued pursuant to statutory authority (Section 10 (a) (1) of the Act, *supra*, p. 3), to show the continuing nature of that offense.

lished, however, from petitioner's own sworn statements before the naturalization examiner, made before the return of the indictment in this case and consequently before the materiality of his age in connection with this prosecution had become evident, that he was born on July 10, 1898, which would have made him well under 45 on February 16, 1942 (*supra,* p. 6). As pointed out by the majority opinion below, since petitioner's parents were dead and birth records were not available, these sworn statements were the best evidence available as to petitioner's age (R. 77). Certainly, the trial court was not bound to believe the interested testimony of petitioner's brother as to petitioner's age, even if the bases on which his brother estimated petitioner's age had been more convincing than they were (*supra,* pp. 6–7). A conviction must, in any event, be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it. *Glasser* v. *United States,* 315 U. S. 60, 80.

Moreover, even if petitioner was over 45 on February 16, 1942, there is certainly no dispute that he was under 65, and hence would have been required to register on April 27, 1942, under the terms of Presidential Proclamation No. 2541 (*supra,* p. 4). He did not register. This duty to register likewise survived beyond the registration date by virtue of § 611.5 (d) of the Regulations. It would seem that this failure to register

could be established under the indictment since the date of the offense charged in the indictment was laid under a videlicet and the indictment did not make reference to any particular Presidential Proclamation fixing a specified date of registration (R. 1–2).

CONCLUSION

The judgment below is correct and there is no real conflict of decisions. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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